

# **TRANSCRIPT**

## **Searching for Equality: The Nineteenth Amendment and Beyond**

A conversation between  
United States Supreme Court Justice  
Ruth Bader Ginsburg and  
Ninth Circuit Court of Appeals Judge  
M. Margaret McKeown

Washington, D.C.

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**PARTICIPANTS:**

*Listed in order of appearance*

**Welcome:**

MICHELLE M. WU

Associate Dean, Library Services, Georgetown University Law Center

**Introduction:**

JUDY PERRY MARTINEZ

President, American Bar Association

GRACE PARAS

Editor-in-Chief, Volume 108, *The Georgetown Law Journal*

**Discussion:**

HON. M. MARGARET MCKEOWN

Judge, United States Court of Appeals for the Ninth Circuit

HON. RUTH BADER GINSBURG

Associate Justice, United States Supreme Court

**Dean Michelle Wu:** Good afternoon. My name is Michelle Wu, and on behalf of Dean Treanor, I want to welcome you to “Searching for Equality: The Nineteenth Amendment and Beyond,” which is cosponsored by Georgetown Law and the ABA [American Bar Association].

I am honored to open this event and introduce to you Judy Perry Martinez of the law firm Simon, Peragine, Smith & Redfearn in New Orleans. She is also the president of the ABA for the 2019–2020 year. President Martinez has served on numerous ABA groups, including as chair of the committee that evaluates nominees to the federal courts. She has also served as the ABA’s lead representative to the United Nations, and as a member of the ABA Board of Governors and its executive committee. She was chair of the ABA’s Presidential Commission on the Future of Legal Services and its Commission on Domestic Violence. She was also a member of the ABA Commission on Women in the Profession, its task force on Building Trust in the American Justice System, and its council of the ABA Center on Diversity.

President Martinez worked at Northrop Grumman from 2003 to 2015 as Assistant General Counsel before becoming Vice President and Chief Compliance Officer. She then spent a year in residence at the Advanced Leadership Initiative at Harvard University before returning to Simon, Peragine. We’re delighted to have her with us today. Please join me in welcoming President Martinez.

**President Judy Martinez:** Thank you, Dean Wu, and thanks to all of you who are gathered here today. The Nineteenth Amendment centennial offers us a once-in-a-lifetime opportunity to celebrate a watershed of American history that paved the way for the largest expansion of democracy in the history of our nation. This year, we recognize courageous historical efforts to gain and exercise the right to vote. The suffrage movement created unprecedented and long-overdue opportunities for women to become involved politically, serving as a model for activists today.

But as we celebrate, we will not squander the historical gift of the Nineteenth Amendment because we must also examine the challenges of democracy and equal rights that face us today. The suffrage movement was neither wholly united, nor inclusive, and ratification did not take a straight path forward. The movement was fractured in the approaches suffrage groups chose to follow. It was sometimes divided by race and class, and at times haunted by racism. There are many legacies of the Nineteenth Amendment to explore and much more work to do. Not only for the benefit of women, but also, of course, for the benefit of our entire democracy. We must overcome the barriers to full democratic participation. We must achieve full enfranchisement for those who, by law, currently have the right to vote and others who, in a just society, should have the right to vote.

While the Fifteenth and Nineteenth Amendments meant that voting rights could no longer be denied because of race or sex, many voters still face ballot restrictions. New constructs evolved, some by misguided—if not malignant—design to strip away the right to vote from otherwise-eligible persons. Other

challenges continue today, including accessibility to polling places for people with disabilities.

The American Bar Association is committed to promoting the democratic values that are the cornerstone of equal justice under the law. That is why we are so proud to celebrate and participate in the commemoration of the Nineteenth Amendment. Our efforts are led by Honorable Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit Court, who will be facilitating the conversation with Justice Ginsburg.

We're partnering with law schools to present programming, provide resources to state and local and affinity bar associations, develop public education materials, and devote this year's May 1st Law Day to the theme entitled, "Your Vote, Your Voice, Our Democracy: The Nineteenth Amendment at 100."

I thank Georgetown Law for being our gracious host, and of course Justice Ginsburg for her participation in the program today. May our work together not only pay tribute to those who came before us and sacrificed on our behalf, but also help us make our democracy stronger in our own time—for everyone.

It's now my pleasure to introduce Grace Paras, Editor-in-Chief of *The Georgetown Law Journal*. Grace has been working with the ABA on a special edition of *The Georgetown Law Journal* that will be published later this year. Before law school, Grace's career centered on access-to-counsel initiatives for detained immigrants. In addition, she's serving as Editor-in-Chief of the *Journal* and is a Blume Public Interest Scholar here at Georgetown Law. After graduation, Grace plans to work at a nonprofit doing impact litigation on public-interest issues before clerking for the Southern District of New York, and then the Second Circuit Court of Appeals. I give you Grace Paras. Thank you.

**Grace Paras:** Hello, my name is Grace Paras, and I'm the Editor-in-Chief of Volume 108 of *The Georgetown Law Journal*. I'm honored to be here, and excited to witness a conversation between two extraordinary legal minds: Justice Ginsburg and Judge McKeown.

As mentioned, I'm up here because the *Journal* is publishing a special issue commemorating the 100th anniversary of the Nineteenth Amendment. In this issue, we'll have four pieces. They'll cover the Nineteenth Amendment's legacy as it touches voting rights, pregnancy discrimination, LGBTQ rights, and race-gender intersectionality. These pieces will be authored by professors Rick Hasen, Nan Hunter, Leah Litman, Catherine Powell, Camille Gear Rich, and Reva Siegel.

We're very excited to partner with the ABA today, and we're especially grateful for the presence of the Honorable M. Margaret McKeown, who is the chair of the Committee and has been our partner in creating this special issue.

Judge McKeown was nominated to the United States Court of Appeals for the Ninth Circuit in 1998 by President Bill Clinton. After becoming the first in her family to go to college, we are very proud that she ended up here at Georgetown Law. She's continued to serve the Georgetown Law community through her role

as chair of the Georgetown Law Board of Visitors for many years, and she also received an honorary doctorate from Georgetown Law.

Judge McKeown teaches at the University of San Diego Law School, and she has received countless awards. Two of the most notable, given this event's partnerships, are the ABA Margaret Brent Women of Achievement Award and Georgetown University Law Center's Drinan Award for Public Service. But I'd be remiss if I didn't point out that she has also won the Girl Scouts' Cool Women Award. I don't think there's ever been a more appropriate recipient.

Besides all the amazing credentials I've listed about Judge McKeown, there are many additional reasons Judge McKeown is "cool." She was the first female partner at Perkins Coie; she's argued before the Supreme Court; she chairs the Ninth Circuit's Workplace Environment Committee; and she was appointed by Chief Justice Roberts to the National Workplace Conduct Working Group. She travels all over the world assisting foreign judiciaries with their judicial ethics codes and implementation of rule-of-law initiatives, and she even survived an avalanche during a mountain-climbing expedition in Tibet. So, without further ado, I am thrilled to invite "cool woman," the Honorable M. Margaret McKeown to the stage, where she will lead a conversation with Justice Ruth Bader Ginsburg. Thank you.

**Justice Ruth Bader Ginsburg:** Thank you so much, everyone. Please be seated, be seated.

**Hon. M. Margaret McKeown:** Good evening, and thank you to Justice Ginsburg for joining us tonight. I was looking at your record, Justice Ginsburg, and I noticed that you've had a lot of name changes over the years. You were called "Kiki" when you were little, for "kicky baby." Then you went by a more dignified name: Ruth. Then you became Professor Ginsburg. Then you became Judge Ginsburg. And finally, Justice Ginsburg—and most people would just quit there. But you have this new moniker of "Notorious RBG." Can I just call you Justice Ginsburg?

**Justice Ginsburg:** You can call me Ruth.

**Judge McKeown:** Okay, Ruth. On behalf of Georgetown Law and the American Bar Association, thanks for being here. I know these are two institutions with which you've had a long association, and of course, we're here tonight to celebrate the 100th anniversary of the Nineteenth Amendment.

While your career has focused on equality very broadly, I want to go back in time and talk about the Amendment. You said at one point that you wished your mother could have lived in an age when women could aspire and achieve, and when daughters were treated equally to sons.

**Justice Ginsburg:** When daughters were cherished as much as sons.

**Judge McKeown:** So, what do you imagine your mother would have been or done had she lived in such an age? And is it true that she marched on behalf of the Nineteenth Amendment?

**Justice Ginsburg:** Yes, my mother was eighteen when the Nineteenth Amendment became part of the Constitution. When she was fifteen and sixteen, she marched in parades in New York.

My mother's mind was bright as could be. She might have been a university professor, or a university president, or a legal luminary, but those occupations were far beyond her reach. She grew up in a large family. Six of her siblings survived into adulthood. She graduated high school at age fifteen. Only one child in her family was a university graduate, the eldest son. My mother went to work at age fifteen to help support the family, which would gain no income from the eldest son during his years at Cornell University. If any child would have a university education, it would not be the eldest or any daughter. It would be the eldest son.

**Judge McKeown:** As we talk further, I will ask you whether you think we've actually achieved that situation, where daughters are cherished as much as sons. But let me turn to the Nineteenth Amendment. Justice Harlan once wrote that the Nineteenth Amendment merely gives the vote to women. And I know that your dissent in the voting rights case, *Shelby County v. Holder*, suggests that you might actually have a more robust view of what something like the Nineteenth Amendment means in terms of voting rights. So, in your view, what is the legacy of the Nineteenth Amendment?

**Justice Ginsburg:** It was the first step toward equal-citizenship stature for women. Some of the suffragists had high hopes for the Nineteenth Amendment. Strictly, it says the right to vote shall not be denied or abridged on account of sex. But if women were to have equality in the political domain—that is, if they were part of the political constituency and could vote—then how could you abide subordination of women in the civil domain? For example, if a woman wanted a loan, she had to get her husband's permission or he had to sign for it.

The courts interpreted the Nineteenth Amendment strictly, said it gave the women the right to vote and nothing more. One of the controversies concerned women serving on juries. In the not-so-good-old days, women weren't called for jury duty. Another was running for office. Yet passage of the Nineteenth Amendment was a miracle of sorts because everyone who voted for it, in Congress and in the states, was male. The suffragists had to sell votes for women to an all-male audience, and that was no easy task. But many of them hoped it would do more than allow women to vote.

I mentioned jury duty and running for office. The National Woman's Party was the more radical wing of the Suffrage Movement. In its members' view, if the Nineteenth Amendment was going to be interpreted restrictively, we needed something else. So they introduced the Equal Rights Amendment in 1923, and almost every year thereafter, until at last Congress let it out. The Nineteenth Amendment was the beginning, but strong feminists believed women should have equality in all fields of human endeavor, so we needed an Equal Rights Amendment [ERA]. In my view, we still do.

**Judge McKeown:** Going back in time, to 1973, you wrote in the *ABA Journal* that we needed an Equal Rights Amendment.

**Justice Ginsburg:** Yes.

**Judge McKeown:** And one of the reasons you gave was it would be great for your granddaughters to pick up the Constitution and see this equality in the Constitution.

**Justice Ginsburg:** I've been asked many times, well, haven't we, through the vehicle of the Fourteenth Amendment's Equal Protection Clause, gotten to about the same place the ERA would take us? And my answer is: not quite, although if you pick up law books today, state or federal law books once riddled with gender-based differentials, you will find that almost all the explicit gender-based differentials are gone.

Every constitution in the world written since the year 1950—even Afghanistan's—has the equivalent of an Equal Rights Amendment. But our Constitution does not. I would like to show my granddaughters that the equal-citizenship stature of men and women is a fundamental human right. It should be up there with free speech, freedom of religion, bans on discrimination based on race or national origin.

The Constitution's Preamble says, "We the People . . . in Order to form a more perfect Union." The Union will be more perfect if we added this clarion statement to our fundamental instrument of government: Men and women are persons of equal-citizenship stature. Even if the statement would be largely symbolic, it is an important symbol. Why should the rest of the world have the equivalent of an ERA while the United States lags behind?

**Judge McKeown:** Well, as you also point out, there is a distinction between the Equal Protection Clause and then having an actual amendment that lays it out. Years ago, I was involved in some litigation involving the extension of the deadline on the Equal Rights Amendment, and we recently had Virginia pass the Equal Rights Amendment. So leaving aside whether any deadlines could be extended, what's your prognosis on when we will get an Equal Rights Amendment on the federal level?

**Justice Ginsburg:** I would like to see a new beginning. I'd like it to start over. There's too much controversy about a latecomer Virginia ratifying long after the deadline passed. Plus, a number of states have withdrawn their ratification. If you count a latecomer on the plus side, how can you disregard states that said, "We've changed our minds"?

**Judge McKeown:** You mentioned women on juries, and so I take some pride in being born in Wyoming, which was the first territory and the first state to grant women the right to vote.

**Justice Ginsburg:** You can tell me if this is true: The reason Wyoming did that is they wanted women to come out there, marry the men, and settle.

**Judge McKeown:** Well, that's one reason. We like to say, "How the West was won." But in fact, the West was far ahead of the East Coast state by state, territory by territory, in adopting the right to vote. But, there were several reasons, not all of them good. One was, they wanted to have women come out and marry. But in fact, women were actually populating the territory quite significantly. One of the other reasons is that at least one of the political parties was losing and they

thought, well, maybe their only hope was to get more voters. And the only way to get more voters was to give women the right to vote. So sometimes good things come out of bad motives, I suppose might be one way to say it.

**Justice Ginsburg:** Another state to give women the right to vote early on was Utah.

**Judge McKeown:** Yes. Well, there's a great story about the Nineteenth Amendment. Tennessee was the last to give the right to women; and there was a particular legislator who was inclined to vote against it. But his mother that morning put a little note in his pocket, and basically said, "Do the right thing."

**Justice Ginsburg:** "Be a good boy."

**Judge McKeown:** "Be a good boy." So, I think it pays to listen to your mother, because he ultimately voted in favor of the Amendment. And then, of course, that vote pushed the Amendment over the line and we got the Nineteenth Amendment. So, it's interesting when you look at the language of the Nineteenth Amendment. Of course, it doesn't say anything about women at all. It talks about the right of citizens of the United States. The right to vote should not be either denied or abridged on account of sex.

**Justice Ginsburg:** It was modeled on the Fifteenth Amendment.

**Judge McKeown:** The Fifteenth Amendment, exactly. So the Amendment talked about citizens, not about women. And this catchphrase, "on account of sex," also has some similarity to "on the basis of sex," and language we see in the discrimination statutes. The public is quite familiar with this phrase, now, "on the basis of sex," because of the movie title *On the Basis of Sex*, of which you're the star, although you're not in it directly. And it was based on the first Federal Court of Appeals case you had, *Moritz v. Commissioner of the IRS*.

My question is, going back to the "Notorious RBG" moniker, you have become quite famous. In addition to your work on the Court, you've taken on a movie-star status that is probably somewhat unusual for a Justice. So how does one, I wouldn't say reconcile, but how do you deal with all of this?

**Justice Ginsburg:** It is amazing. I am soon to be eighty-seven years old, and everyone wants to take a picture with me!

**Judge McKeown:** Well, I think all of those here would like to come on down for a photo as well.

**Justice Ginsburg:** The Notorious RBG was created by a law student, an NYU second-year law student. It was the year that the Supreme Court decided the *Shelby County* case, which nullified the key provision of the Voting Rights Act of 1965. The law was renewed periodically with large majorities on both sides of the aisle, and it had recently been renewed. The way the Voting Rights Act worked was, if you had a record of keeping African-Americans from voting, you could not pass any new election law without preclearing, either with the Civil Rights Division of the Department of Justice or a three-judge federal district court in D.C.

That provided a check on laws that were aimed at suppressing minority voters. You couldn't pass the law unless you got it precleared. The law was attacked as



obsolete. The argument was that some states that might have discriminated in 1965 are no longer denying African-Americans the right to vote. The statute had a built-in check to take care of that kind of situation. It was a bailout provision. If you have had a clean record for X number of years, you can apply to be released from preclearance. But the majority of my Court thought the formula was obsolete. It needed to be done over.

One of the points I made in my dissent was, what member of our Congress is going to stand up and say, “My state, or my city, or my county is still keeping African-Americans from voting, so please keep us under the gun of the preclearance system”? That just wasn’t going to happen.

Who knows more about the political world, the Congress or the Court? Congress said, “We want the Voting Rights Act. It’s working well.” And the Court said, “You can’t have it unless you change the coverage formula.” Judicial activism? Congress overwhelmingly passed and renewed the law, but the Court nullified its key provision.

Well, this second-year student was angry about the decision. She thought, “The legislation was really working and the Supreme Court stopped it.” Then she thought more and decided that anger is a useless emotion. It just gets you riled up, but it doesn’t move you forward. So she wanted to do something positive. She took not my full dissenting opinion, but the summary of it I read from the bench the day the decision was handed down, and put the bench announcement on Tumblr. From there, it went out into the wild, blue yonder. That happened, I think, because young people yearned for something positive, something inspirational.

The second-year student, by then a law school graduate, paired with a journalist to write a book called *Notorious RBG*. The book is now the basis for an exhibition traveling around the country. It opened in Los Angeles, then moved on to Philadelphia, and currently is in Chicago. Some months from now it will come to New York. There’s a *Notorious RBG* for adult readers, and a *Notorious RBG* for young readers. And there are many children’s books, even coloring books, about me.

**Judge McKeown:** Well, it’s probably true that many Americans would have had trouble naming a Supreme Court Justice, except they would have no trouble now because of all this publicity. And you’ve really become an icon, I think for children, women, and the public. How has it changed your life?

**Justice Ginsburg:** It’s changed my judicial assistants’ lives because we are flooded with requests and invitations. I could be getting an award every day of the week.

**Judge McKeown:** Well, we don’t have an award for you tonight, but we are just happy to have you here!

**Justice Ginsburg:** I should say something you didn’t yet mention. The scriptwriter for *On the Basis of Sex* is my nephew. I asked him, “Why did you choose the *Moritz* case? It wasn’t reviewed by the Supreme Court.” His answer was that

he wanted the film to be as much the story of a marriage as the story of the development of a legal strategy. I think he succeeded in that.

Before *On the Basis of Sex*, there was a documentary called *RBG* done by Betsy West and Julie Cohen. Years before, those two women had done a special for PBS about the revived Women's Movement starting in the late 1960s and continuing through the 1970s. They interviewed all kinds of people for it, people on both sides. There was an interview with Phyllis Schlafly, who single handedly brought down the Equal Rights Amendment. There was Gloria Steinem, and many more. I was one of the people interviewed. The creators of that documentary decided they would like to do one focused on the American Civil Liberties Union's (ACLU) litigation efforts in the 1970s to invigorate the Equal Protection Clause so that it works for women and men.

**Judge McKeown:** I just want you to know, I took my law clerks to see both of these movies.

But you mentioned regarding *Shelby County*, the dissent. And one of the outflows of *Notorious RBG* has been a whole series of paraphernalia, and related items that one can buy, including a little pin called the dissent-collar pin. Would you share with us your thinking about the dissent collar?

**Justice Ginsburg:** I do have a dissent collar. Years ago, *Glamour Magazine* gave me a Lifetime Achievement Award. It came with a bag filled with goodies. One of them was what became my dissent collar. It looked to me just right for dissents. Nowadays, I get a collar perhaps once a week. They come from all over the world. People send me two kinds of wearable things: collars and scrunchies.

**Judge McKeown:** I hope you're not replacing the dissent collar in any way. It will keep its status and position in your chambers. And around your neck.

**Justice Ginsburg:** My majority-opinion collar has multiplied, so there's some variety in those.

**Judge McKeown:** And some variety in the scrunchies as well.

**Justice Ginsburg:** Yes.

**Judge McKeown:** Going back to the suffragists, one of the things that they did to raise money was to sell cookbooks. And there was sort of a double entendre to the whole endeavor, because they wanted to show that women could have a role in the kitchen and outside the kitchen.

I know that in your family, Marty had a particularly prominent role in the kitchen as the chef, and maybe your role was a little less illustrious. But you did raise two amazing children. And we now hear this buzzword now about "work-life balance," which I don't even think had come into the lexicon when you were raising your children. Would you share how you navigated your home and professional life as you moved through your various stages?

**Justice Ginsburg:** Marty was a super cook. After our marriage, we spent our first two years together at the artillery base in Fort Sill, Oklahoma, where he was in military service. Marty had been a chemistry major at Cornell until golf practice interfered with chemistry labs. So he switched to government, which was my major.

My cousin sent him, as a joke, an English translation of *The Escoffier Cookbook*. Marty started with the basic stocks, and he worked his way through. I still have the book. Food stains all over its pages. Our arrangement: I was the everyday cook, and Marty was the weekend-and-company cook. I was never allowed to cook for anyone who wasn't in the family. I made seven things. The recipes came from a book called *The 60 Minute Chef*. Sixty minutes from the time you enter your home until dinner is on the table. I cooked in rotation; after I got to seven, I went back to one.

Jane, my daughter, when she was in her high school years, became increasingly aware of the enormous difference between daddy's cooking and mommy's cooking. She decided that not only should daddy be the weekend-and-company cook, he should be the everyday cook as well. For me, it was like Tom Sawyer getting the fence painted. We've been living in Washington D.C. since 1980; I've not cooked a meal in all those years.

When Marty died, my daughter Jane felt responsible for phasing me out of the kitchen. So, she comes once a month, cooks up a storm, makes individual dinners for me, which we put in the freezer, and then we do something nice in the evening.

After Marty died, Martha Ann Alito, the wife of Justice Alito, decided that the tribute just right for Marty would be a cookbook containing some of his recipes. It's called *Chef Supreme*. The supreme chef is Marty. Each section is introduced by the spouse of another Justice, in seniority order, starting with Maureen Scalia. It is one of the best-selling books in the Supreme Court gift shop.

**Judge McKeown:** I think that's quite an achievement to say you haven't cooked a meal for decades.

**Justice Ginsburg:** The Supreme Court spouses meet quarterly for lunch, and they rotate catering responsibilities. Marty was always the number-one pick to be co-caterer.

**Judge McKeown:** Yes, for a good reason. The ABA Commission on the Nineteenth Amendment is taking after the suffragists, and we're going to publish a digital cookbook to celebrate the Nineteenth Amendment. I wonder what recipe would Marty have contributed to that? And which one of your rotating seven would you pick out?

**Justice Ginsburg:** You wouldn't want any of them. I thought my one fish, two fish, red fish, blue fish was pretty good, but my children don't agree.

Marty's lime soufflé was sublime, and then there was his ultimate unkosher dish, pork braised in milk. His crowning achievement was French baguettes. He worked for a year to get that recipe right, and he had the highest praise he could get: the French ambassador to the United States said that Marty's baguettes were the best outside France.

**Judge McKeown:** Well, that's a tribute. I think the suffragists would be quite proud to say they've achieved some equality because of Marty's contribution to the culinary world, along with the tax world and the professor world as well.

I want to talk with you now about your life as an advocate. When I was a student here at Georgetown, I took one of the very first sex discrimination classes, and I was somewhat flummoxed about where I would look for source information. I was advised, “you should write to Professor Ginsburg,” which I did. And you kindly supplied me with enough to get through a paper for the end of the semester.

But of course, things have changed quite a bit in terms of the number of women in law school. We have just over fifty percent and this year, they’ve just done a big celebration of the editors-in-chief at the top law journals, including Georgetown, where Grace Paras is the Editor-in-Chief—they’re all women! So, things have changed somewhat since you were one of nine women in a classroom?

**Justice Ginsburg:** In an entering class of over 500 students, nine were women. Harvard Law School didn’t begin to admit women until 1950–1951. That was the first year; I came in 1956. My class had nine. Marty was one year ahead of me; his class had five. When I was a first-year student, there was one woman on the law review. She was in the second-year class. I was the lone woman in my class.

I never had, in all my university years—not in undergraduate school, and certainly not in law school—a woman teacher. At Cornell, a woman taught physical education, but that was it. No women in academic fields. So, for me, the change is just huge. When I started law school in 1956, women were just three percent of the lawyers across the country.

On the bench, they just weren’t there. The first woman appointed to a federal court of appeals, Florence Allen, was appointed by Franklin Delano Roosevelt in 1934. She was named to the Sixth Circuit. She retired in 1959, the year I graduated from law school. Then there were none again until 1968, when President Johnson appointed Shirley Hufstедler to the Ninth Circuit, Margaret’s court.

The first woman ever to be appointed to a federal district court judgeship was Burnita Shelton Matthews. She was a recess appointee in 1948, and got a permanent seat in 1949. Burnita Shelton Matthews was general counsel to the National Woman’s Party. She was a soft-spoken woman from Mississippi, but she was made of steel. In the district court, she hired only women as law clerks. Her reason: her colleagues hired only men. She was responsible—we’re talking about the 1950s—for the admission of the first African-American to the bar of the D.C. District Court.

When I got to D.C., she was well into her nineties. She was no longer sitting, but she would come to chambers occasionally. And it was such a treat for me to hear her stories. She spoke about picketing the White House. She was going to law school at night. She had a day job, but she took part in the picketing at the White House, when Wilson was president. It took him a while, a long while, before he became a supporter of the Nineteenth Amendment. So, she’d go to the White House, hold up a little sign that said, “Votes for women” and if the police tried to hassle her, she would never talk back. She didn’t want to risk having an arrest record, which might hold up her admission to the bar.

The National Woman's Party was headquartered on land where the U.S. Supreme Court now stands. When the government took the property to build the Court, Burnita Shelton Matthews, who happened to be a specialist in eminent domain, asked for a high price. The government, the Department of Justice, argued, "It's just a ramshackle old building. It's not worth very much." Burnita Shelton Matthews called as a witness a member of a group called the Association of the Oldest Inhabitants of the District of Columbia to testify about the building having been used as a jail for notorious Confederate spies during the Civil War. And before that, it was the temporary Capitol when the Capitol burned down in the War of 1812. The government didn't relent.

Finally, Matthews introduced a photograph of a notorious Confederate spy, who happened to be a woman, taken inside the building. At last, the government threw in the towel. Matthews won for the National Woman's Party the largest condemnation award the United States had ever paid up until that time. She was also active in the American Bar Association. She sought in that arena to counter opposition to the Equal Rights Amendment.

Opponents feared that the Amendment would end protective labor legislation for women. Matthews wrote an article in the *ABA Journal* pointing out that so-called protective legislation often worked to protect men's jobs from women's competition. No night work for women. Well, if you serve tables in a restaurant, tips are higher at night than during the day. The protection allowed women to work no more than forty hours per week. If you want to earn double time or time and a half, you want overtime hours, but you're "protected" from them and the earnings they garner.

During World War II, many occupations were filled by women because the men were away fighting the war. One such occupation was bartending. The state of Michigan passed a law providing that a woman could not tend bar unless the establishment was owned by her father or her husband. The plaintiffs in that case were mother and daughter Goesaert: Mother owned the tavern; her daughter was the bartender. This law could have put them out of business immediately. Their case got to the Supreme Court in 1948. The Court's reaction: "Bars can be raunchy places, so we need to protect women from that atmosphere. Michigan does so by prohibiting them from being bartenders." Burnita Shelton Matthews saw from the beginning that these so-called "protections" were not real favors for women. She was a very effective advocate.

**Judge McKeown:** You argued in the Supreme Court at a time when there were few women advocates. And, of course, you argued a number of these upside-down cases on discrimination. We know that there are inroads being made little by little in terms of women arguing in the Supreme Court. But you probably know a lot more now than you did when you argued your first case in the Supreme Court. So, what do you know now having been a Justice and being on the other side of the bench that you would like to convey to advocates before the Court, or the courts of appeals, or otherwise?

**Justice Ginsburg:** I knew then what has been reaffirmed over and over again. The Supreme Court is, what lawyers call, a hot bench. That is, every Justice has done his or her homework and is well armed for oral argument. That's not universally true of appellate benches. I remember one argument in a federal circuit court—I will not say which number.

**Judge McKeown:** I don't think it was ours!

**Justice Ginsburg:** My students came with me to this argument. I thought our reply brief was devastating. I started arguing and sensed early on that the panel hadn't even read my opening brief. So I had to retract to being a kindergarten teacher and lead the judges gently in the direction I wanted them to go. Dealing with a cold bench can be disillusioning for an advocate.

**Judge McKeown:** Right. Well, the opposite of that, of course, is when advocates are making an argument and then they're interrupted. Some of the more recent studies have suggested that both female Justices and female advocates are interrupted more than their male counterparts. And they've even suggested that the male Justices interrupt the female Justices three times as often. And curiously—and maybe not so curiously—sometimes this pattern has been reversed, where there are gender-related cases. Why is this happening in 2020?

**Justice Ginsburg:** I'll tell you a funny story about interruption. Some years ago, there was a headline in *USA Today*. It read, "Rude Ruth Interrupts Sandra." In oral argument, a Justice may ask a first question. Sandra asked a question. I thought she was done. She wasn't. I asked a question. Sandra shot back, "Just a minute. I have follow-up questions." That precipitated the "rude Ruth" story. At lunch, I said, "Sandra, I'm so sorry I stepped on your question." She replied, "Ruth, it's okay. The guys do it to each other all the time."

I contacted the reporter who wrote the story about my interrupting Sandra. I suggested that he watch the court for the next two sittings and see if he observes the men stepping on each other's questions. After that time elapsed, he said, "Yes, they do. But I didn't notice it when it came from men." He did notice it when two women were involved.

There was a woman, a professor of linguistics, who tried to explain why this happened. She said, in effect, "Justice O'Connor is the girl of the Golden West. She grew up on the Lazy B Ranch. Ginsburg is a fast-talking Jew from New York. Their styles are different." Well, people who knew the two of us understood that Sandra got out two words for my every one. But again, it was a stereotype at work. It was to the good that the article about interruption was written, because I think the disparity was largely unconscious. I expect you will see a change in that regard.

You mentioned that now women are at least half the law students. One of the interesting things about the increase is that a big jump up in women's enrollment is attributable to minority women. That's a healthy development. But as to law clerks—and you tell me if it's true of the Ninth Circuit—we get many more applications from men than from women for Supreme Court clerkships. Of the

advocates who appear before us, less than twenty percent are women. Now, that's still a huge improvement from the way it once was.

The first woman ever to clerk for the Supreme Court was way back in the 1940s. She was Lucile Lomen, who clerked for Justice Douglas. The West Coast deans chose his clerks, and they wrote one year that they had no one of the quality required for them to recommend. He asked, "When you say that, have you considered women? If you have one who's brilliant, I will consider her." I understand that Lomen's was a successful clerkship. But no second woman appeared until 1968 when Justice Black hired Margaret Corcoran. She had a special entree to Justice Black's chambers: her father was a well-known Democratic Party operative. They called him "Tommy the Cork."

One weekend, the Justice gave Margaret a bunch of cert petitions and said, "Digest these for me over the weekend." She came in on Monday; she hadn't done it. She explained that her father, a widower, had to attend a number of party functions, and he needed a woman to accompany him. So she did so instead of dealing with the petitions. The Justice didn't take kindly to that. It wasn't until the 1970s that women showed up as law clerks in numbers. In those days, the Supreme Court had two clerks, not four as we have now. In 1972, the West Coast deans recommended two women to Justice Douglas. He wrote back, "That's women's lib with a vengeance."

**Judge McKeown:** Yes. You probably know I'm writing a book about Justice Douglas, and that first clerk was from the University of Washington, Lucile Lomen, as you said.

One thing I want to go back to is Justice O'Connor. Obviously, being the first two female Justices you had some challenges the others didn't. But one time Justice O'Connor asked you, "Where would we be if there was no discrimination?" And you answered, "I think we'd be retired partners from a big law firm. But since there was discrimination, we ended up here," which is not a bad place to end up from most people's perspective.

**Justice Ginsburg:** But we had to make our own path.

**Judge McKeown:** You did.

**Justice Ginsburg:** Let me tell you how Sandra, who stood near the top of her class at Stanford Law School, got her first job. She volunteered to work for free for a county attorney and proposed, "At the end of some months, if you think I'm worth it, you can put me on the payroll."

I got a clerkship with a district judge because Gerry Gunther, who was then teaching at Columbia and later transferred to Stanford, called every judge in New York's Eastern and Southern Districts, and every judge on the Second Circuit bench. He finally came to one who was a Columbia College and a Columbia Law School graduate, and often took his clerks from Columbia.

The judge's response was, "Well, her record is good, but she has a four-year-old daughter. I can't risk it. Sometimes I need my clerk's aid even on a Sunday." Gerry said, "Give her a chance. And if she doesn't work out, there's a young man in her class who is going to a downtown firm; he will jump in and take over."

That was the carrot. There was also a stick, and the stick was, “If you don’t give her a chance, I will never recommend another Columbia student to you.”

For the women in my class, getting that first job was a tremendous hurdle. If you got the job, you did it at least as well as the men, so the second job was not the same impediment.

**Judge McKeown:** Well, I certainly would invite you to continue to take a look at your clerkship opportunities in the Ninth Circuit, because we have quite a nice complement of male and female clerks. I know you’ve hired one of my clerks, but we’re seeing the male applicants, of course, are exceeding the female applicants.

So, let me go back to another sex discrimination point, and that relates to some of your cases. We have this great bobblehead here, which is representative of a number of things, actually. But one of these items shows you pulling the plug on this safe, where there are pennies inside. And that’s a reference to your dissenting opinion in *Ledbetter v. Goodyear*. And shortly after that, following your dissent, Congress passed the Lilly Ledbetter Fair Pay Act. What lessons can be learned for students, professors, and judges from the Lilly Ledbetter case?

**Justice Ginsburg:** One lesson is that on questions of statutory interpretation, as distinguished from constitutional interpretation, the Supreme Court does not have the last word. Congress does. In the *Ledbetter* case, I thought my colleagues had erred—not just erred, but egregiously so. The tagline of my dissent in her case was: the ball is now in Congress’s court to correct the error into which my colleagues have fallen. There was a groundswell to pass the Lilly Ledbetter Fair Pay Act. As was true earlier of the Pregnancy Discrimination Act, the Lilly Ledbetter Act passed with large majorities of Republicans and Democrats voting for it.

The Lilly Ledbetter Fair Pay Act was the first piece of legislation President Obama signed when he took office. Lilly’s story is one familiar to every woman of my generation and of hers. She was an area manager at a Goodyear Tire plant. When she gained that employment, it was a job dominated by men. When she came on board in the 1970s, she didn’t want to be viewed as a troublemaker. She didn’t want to rock the boat, she just did her job.

Then one day, after she had worked at the plant for years, someone put a slip of paper in her plant mailbox. It contained a series of numbers. She recognized what those numbers represented. They were the pay of every area manager. She saw that the young man she had trained to do the job was earning more than she was earning. So, she decided, “I’ve had it. I’ll sue.” She began a Title VII lawsuit. She succeeded in the district court. It was a jury case. She got a good verdict. Eventually, her case came before the Supreme Court. The Court ruled, 5–4, “Lilly, you sued too late. Title VII says you must file a complaint with the EEOC within 180 days of the discriminatory incident. And you filed years later. You are way out of time.”

In my dissent, I explained why she waited. First, her employer didn’t disclose pay figures. Also, she didn’t want to rock the boat. And if she had complained



early on, “They’re paying me less because I’m a woman,” her employers would have answered almost certainly, “It has nothing to do with Lilly being a woman. She just doesn’t do the job as well as the men.” But when she’s been working there year after year and getting good performance ratings, that defense—that she doesn’t do the job as well as the men—is no longer available to them. She has a winnable case. But the Court held she sued too late.

My dissent was simple. I said, “The discrimination she encountered is repeated every month. It’s reflected in every paycheck she received. So as long as she sues within 180 days of a paycheck, her suit is timely.” And that is exactly what Congress amended Title VII to say—what I thought Congress meant all along.

**Judge McKeown:** Common sense.

**Justice Ginsburg:** We might compare Ledbetter’s suit to another case of statutory interpretation, also concerning Title VII, *Gilbert v. General Electric*. In that case, the Supreme Court reached the remarkable conclusion that discrimination on the basis of pregnancy is not discrimination on the basis of sex. The world is divided into two kinds of people: nonpregnant people, and they include many women, and pregnant people, all of them women, there’s no male to compare them to, so discrimination against them can’t be sex discrimination.

**Justice Ginsburg:** In 1978, Congress passed the Pregnancy Discrimination Act. It said what should have been evident to all members of the then-Supreme Court: Discrimination on the basis of pregnancy is discrimination on the basis of sex.

**Judge McKeown:** On the basis of sex. And sometimes they mean what they say in Congress, correct?

**Justice Ginsburg:** When we’re dealing with a statute, Congress can fix it. When it’s a question of constitutional interpretation, we have the last word. In a dissent on a constitutional question, the dissenter is writing for a future Court. We have a long history of dissents. We have seen many dissenting opinions eventually become the law of the land. Even if you go back to the worst decision the Court ever made, the *Dred Scott* decision, there were two dissenters. Or *The Civil Rights Cases* in the 1880s, and *Plessy v. Ferguson* in 1896. Justice John Marshall Harlan, the first Justice Harlan, dissented in those cases.

Moving to the World War I period, recall the free speech dissents by Holmes and Brandeis. Today, they are not questioned as being the proper interpretations of the First Amendment. So, you’re writing a dissent for a future Court, one you hope will better understand how the Constitution should bear on particular conduct.

**Judge McKeown:** You’ve indicated obviously that you’re hoping, over time, the Court will see it the way you do, and that’s why you’re writing for a future age when you’re in the dissent in one of these kinds of cases. Right?

**Justice Ginsburg:** Most immediately I’m trying to get one more vote. When I circulate a dissent, that’s my first hope, a hope that is often disappointed. But there’s always a chance. I remember being assigned a dissent by my senior colleague. It was in a criminal case. The vote was 7–2 at the conference. In the

fullness of time, the opinion was released. It came down 6–3. The two had swelled to six, and the seven had shrunk to two.

**Judge McKeown:** But you’re not always writing in the dissent, of course, and our little bobblehead here displays another great case. This is one where you wrote for the majority: *United States v. Virginia*. You can see the bobblehead of Justice Ginsburg is towering over the campus at the Virginia Military Institute (VMI). And obviously, the majority struck down VMI’s male-only admissions policy. And your good friend and opera colleague, Justice Scalia, wrote a rather spirited dissent . . .

**Justice Ginsburg:** Spicy!

**Judge McKeown:** . . . some say spicy. The legal writers like to say scathing. And he asserted that the Court was destroying VMI. Now I know you’ve been back there to visit. What do you think of Justice Scalia’s prediction?

**Justice Ginsburg:** He was entirely wrong. He thought that admitting women would destroy VMI as we know and love it. The VMI faculty cheered the decision. Something revealing about the case: The title is *United States v. Virginia*. It’s the United States government suing the state of Virginia, saying, “You cannot make an educational opportunity available to one sex only.” The faculty saw the admission of women as an opportunity to upgrade the quality of VMI’s applicant pool.

Many people asked, “What woman would want to go through the ratline and subject herself to VMI’s regimen, the cadet’s Spartan existence?” I replied, “Well, I wouldn’t. You are a man, and you probably wouldn’t either.” But some women want that experience and are well-equipped to pursue it.

We were invited to visit VMI for the twentieth anniversary of the decision. As it turned out, I was able to manage the twenty-first anniversary. The faculty and staff were so proud of the women cadets. VMI still has the ratline; the quarters for cadets are still Spartan. But the school now welcomes women, some of them aspiring to be engineers or nuclear scientists. VMI’s transformation is a great success story.

**Judge McKeown:** Well, that’s why your bobblehead is standing on the campus of VMI. But now women are standing on the campus at VMI as students as well.

**Justice Ginsburg:** I was visiting West Point soon after the announcement that the combat restriction for women would be lifted. The women cadets were elated by that announcement.

**Judge McKeown:** One of the things that you have, I guess not to your name, but to your association, is a workout book, which may not be totally common among the Justices. Not that they don’t work out, but they don’t have a book about working out. So, what do you actually do to keep in shape? Do you follow *The RBG Workout* book?

**Justice Ginsburg:** I follow the author, Bryant Johnson. He has been my personal trainer since 1999, the year I had colorectal cancer. My dear husband said after my surgery and long courses of chemotherapy and radiation, “You look like a

survivor of a concentration camp. You must do something to build yourself up.” So I asked around. Did you know Gladys Kessler? She was a U.S. district court judge in D.C. She said, “I have the just the right person for you. He works at our clerk’s office. He’s my personal trainer. He would be good for you.” And Bryant has been with me all these years. Now there’s a Bryant Johnson-authored book, *The RBG Workout* book. There’s also a calendar.

**Judge McKeown:** It’s a good workout book, not that I am qualified to recommend a workout book! He’s encapsulated pretty carefully what you need to do to keep in shape. Let me ask you, one of the things you’ve mentioned is cancer giving you a zest for life that you might not have even had before. But would you share with us how being a survivor has shaped you as a person and as a Justice?

**Justice Ginsburg:** Cancer does give you a zest for life you didn’t have before. Every day is precious. I’ve had four cancer bouts since I joined the Court, and I was able to get through them without missing participation in any case. With this latest lung cancer, for one month I couldn’t physically be at the Court. But I listened to the arguments on tape, and I had an opinion assignment from that sitting.

My colleagues rallied around me and helped me get through some very trying days. Justice O’Connor, who had a mastectomy, was on the bench nine days after her surgery and gave me great advice. She said, “You’re going to have chemotherapy. Schedule it on Friday. That way you can get over it Saturday and Sunday, and be back at work on Monday.”

**Judge McKeown:** Well, I think you’ve been a remarkable hero to many who have had cancer and survived it. But, also, just your indomitable spirit is something that keeps other judges going, I want you to know. The same is true for law students—many of whom are here. I have two questions from the law students I want to ask you. The first question relates to the Equal Protection Clause. The question is: are you satisfied that gender should receive only intermediate scrutiny under the Equal Protection Clause? Or should gender classifications instead be subject to strict scrutiny?

**Justice Ginsburg:** I’ve told law students on more than one occasion: watch what we do. Law students like to have secure handholds: there’s rational basis, next intermediate scrutiny, then strict scrutiny.

Justice O’Connor wrote an opinion saying strict scrutiny, used for racial classifications, is not necessarily fatal in fact. A number of statutes have been held invalid under the rational-basis test. So, the bottom, rational basis, is moving up; the top, strict scrutiny, is moving down. I think Justice Thurgood Marshall had it right when he said, “In reality, there aren’t three tiers. There’s a sliding scale, and it depends upon the strength of the government’s interest and the importance of the right the person is asserting.”

The words of the Equal Protection Clause are: “[N]or shall any State . . . deny to any person . . . the equal protection of the laws.” Sounds like it fits very well, except that the Fourteenth Amendment was meant to deal with the burning issue of the day—the legacy of slavery. In the second section of the Fourteenth Amendment, for the first time, the word “male” appears in the text of the Constitution.

Before the Fifteenth Amendment, there was an effort to stop the Southern states from barring African-Americans from voting. The mechanism was if you keep people from the polls, then, to the extent that you are not allowing men to vote, your representation in Congress will shrink in proportion to the people you have kept from voting. It didn't work, so the Fifteenth Amendment passed outlawing race-based discrimination in voting.

By the way, since we started out talking about the Nineteenth Amendment, the Nineteenth Amendment follows the wording of the Fifteenth Amendment. But the Fifteenth Amendment was honored in the breach for so many years. One of the concerns of some of the Southern politicians was, does the Nineteenth Amendment mean we will have to allow African-American women to vote?

As it turned out, the barriers to minority voters continued, and they affected women as well as men. Initially, the Nineteenth Amendment gave white women the right to vote. It took the Voting Rights Act to begin to break barriers to African-American voters.

**Judge McKeown:** That prior question came from Erin O'Neill, one of the members of *The Georgetown Law Journal*, and one of my incoming clerks. And of course, we're always told not to read the tea leaves, we're supposed to decide case by case. But we're always reading the tea leaves from the Supreme Court—or whatever leaves you choose to scatter that we can read and try to interpret for cases to come.

So, here's a related question. This one comes from Max Crema, who is also a *Journal* member and one of my incoming law clerks. He talks about the fact that, although women formally won the vote 100 years ago, many young women of color are still disenfranchised, particularly through restrictive voting laws. What is your comment on that in terms of where we are going in the voting-rights arena?

**Justice Ginsburg:** I'm pleased that one of my former law clerks is spending a good deal of her time getting eighteen-year-olds to register to vote, especially minority women. She goes with them to the registration place. I think that young people are going to make a difference. What our government does now will affect their lives, so they should care deeply about exercising the right to vote. And there should be concerted efforts to see that before they go to vote, they are registered properly.

**Judge McKeown:** Obviously, registration is an important thing, and nondiscrimination is also important. And you've spent your life in the field of equal protection. For us, it's really a privilege to have you here tonight at Georgetown Law to talk about many of these things. I have about 2,000 more questions, but I am going to shorten it and let you have the last word.

**Justice Ginsburg:** First, on the Nineteenth Amendment, there is a very good exhibition at the Archives. The story is told as accessibly as can be. And it has some funny things in it, like a letter from a woman in Iowa. She wanted to be a soldier, lead the troops; but she insisted women should not have the right to vote.

There were inconsistent or outlandish arguments. One was: they're just going to do what their husbands tell them to do, so it won't make any difference.

Another was: allowing women to vote would cause dissension in the home and lead to divorce and neglect of children. There are cartoons of men taking care of screaming babies so their wives could go off to vote. But the Seneca Falls gathering took place in 1848. It's now seventy years later. We have to be persistent, yet patient. What was it that Susan B. Anthony said—"Failure is impossible"?

**Judge McKeown:** Impossible, yes.

**Justice Ginsburg:** She never got to see the Nineteenth Amendment ratified, but she knew it would happen. So I recommend the exhibition at the Archives. In my long life, I have seen such positive change.

Yes, we worry about our dysfunctional Congress with the parties so sharply divided. But think of how it was, not all that long ago, in 1993, when I was nominated and confirmed 96–3. No questions asked about the ten years I spent most of my time as co-founder of the ACLU Women's Rights Project and one of four general counsel to the ACLU. Also, Justice Scalia had written about his philosophy when he was a law professor, and he had a track record on the D.C. Circuit. The vote for him was unanimous.

Justice Breyer, who followed me by a year, also in the 1990s, was confirmed by a large majority. It hasn't been that way for the last set of nominations, but I am hopeful there will be leaders on both sides of the aisle who will say, "It's time to get together and work for the good of the country." That is my hope, and I would be content if I could see it happen in my lifetime.

**Judge McKeown:** Thank you. Thank you for your time, Justice Ginsburg.

**Justice Ginsburg:** Thank you.

**Dean Michelle Wu:** Thank you to Justice Ginsburg and Judge McKeown for a fascinating discussion. Thanks also to ABA president Judy Perry Martinez and Grace Paras for bringing the panel here.